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IN THE

Supreme Court of the United States

October Term, 1968

No. 1285

DETROIT VITAL FOODS, INC.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner presents its petition for a rehearing of this Court's order dated June 2, 1969, denying its petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, and, in support thereof, respectfully shows:

1. This petition for rehearing is based upon substantial grounds available to petitioner, although not previously presented, and on intervening circumstances of substantial effect pursuant to Rule 58, subdivision (2) of the Rules of this Court.

2. The opinion and judgment of the Court of Appeals as to which certiorari was sought was entered on February 20, 1969, and is reported at 407 F. 2d 570 (C. A. 6, 1969). The opinion specifically stated that "several grounds of assigned error were argued in briefs, but we

consider it necessary to discuss only one" (App. A, 31 A).*. This opinion of the Court of Appeals superseded and expunged a first opinion of the Court of Appeals, entered on July 26, 1968, which was not officially reported since it does not constitute the court's disposition of the appeal (App. A, 18a). In the first opinion the Court of Appeals made the following statements:

> "Several grounds of assigned error were argued in briefs, but we consider it necessary to discuss only one . . . We observe for the benefit of the Trial Judge and counsel in the event of another trial that we find no merit in the other grounds assigned as error by the defendants" (App. A, 20a, 27a).

Significantly, the first opinion reversed petitioner's conviction, while the second opinion, which did not consider the other grounds of assigned error, affirmed the conviction.

3. Simultaneously with the filing of the petition herein, the government filed a petition for a writ of certiorari in Docket No. 1291 to review the judgment of the Court of Appeals dated February 20, 1969 reversing the judgment of conviction with respect to the individual defendants in the same action. On June 2, 1969, this Court granted the government's petition. The government's petition sought review of only one of the several grounds of assigned error urged on the appeal to, and considered by, the Courtof Appeals, namely, whether the individuals Fifth Amendment privileges were violated by the fact that the government, in a prior civil proceeding, had directed interrogatories and used the answers thereto to

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* References are to the pages of the appendix of the petition for a writ of certiorari filed herein.

indict petitioner herein and the individual defendants (respondents in Docket No. 1291).

4. In the instant petition, petitioner sought to obtain review of the other grounds of assigned error rejected by the Court of Appeals in the first unofficial and subsequently expunged opinion, but not considered in the second and only official opinion. It is thus unclear whether this Court denied the instant petition for certiorari because the second opinion of the Court of Appeals failed to consider the other grounds of assigned erorr, i.e., because the issues were thus not ripe for review by this Court, or whether this Court considered the first unofficial opinion as a dispositive ruling of the said grounds and did not consider that they presented substantial enough questions for review or lacked merit. Petitioner herein is thus in a quandary. If this Court denied the petition for certiorari herein on the basis of the first opinion, neither the petitioner herein nor the individual defendants (respondents in Docket No. 1291) will ever be afforded the opportunity of having these questions considered by this Court. If, on the other hand, this Court denied the instant petition on the basis of the second and only official opinion, this Court, should it reverse the Court of Appeals' ruling with respect to the individual defendants in Docket No. 1291, will be required to remand the case to the Court of Appeals to pass upon the grounds of assigned error urged in the instant petition, but never considered in the said second official opinion.

The orderly and fair administration of criminal justice will be advanced by the granting of the instant petition for rehearing. In Docket No. 1291, dealing with the reversal by the Court of Appeals of the individual defendants' judgment of conviction, the Court of Appeals was not required to and did not pass upon the other

grounds of assigned error. However, these other grounds, which apply equally to the corporate petitioner herein, were presented to this Court by the instant petition for certiorari. Thus, in the event this Court were to reverse the Court of Appeals' ruling in Docket No. 1291, it would be required to remand the case to the Court of Appeals to pass upon the other grounds of assigned error, which in all likelihood would subsequently come back to this Court for final review. If, however, this Court were to grant the instant petition for rehearing, it would have the opportunity, without further delay, to pass upon the questions presented in the instant petition which relate directly to the validity of both the individuals' and the corporate petitioner's convictions.

5. Because of the unusual circumstances involved herein, this Court should either grant the instant petition for rehearing to review the questions presented in the instant petition, or, alternatively, specify whether the denial of the instant petition for certiorari was based upon a failure of the Court of Appeals to pass upon the other grounds of assigned error, and, consequently did not present reviewable questions. Petitioner recognizes that under ordinary circumstances, the affirmance by the Court of Appeals of the corporate petitioner's conviction on any ground might include a *sub silentio* holding that all other grounds of assigned error were considered and rejected. However, this general principle is not applicable as to the Court of Appeals' ruling with respect to the reversal of the individual convictions. Obviously, having found one assigned ground of error sufficient to justify a reversal of the individuals' convictions, the Court of Appeals was not required to pass upon, and in its second and only official opinion, did not pass upon the validity of the other grounds of assigned error. The questions sought to be

reviewed in the instant petition are directly and inextricably related to the conviction of the individuals. Consequently, the granting of the instant petition for rehearing, or clarification of this Court's reason for denying the petition will safeguard and secure the rights of petitioner and the respondents in Docket 1291 to have the grounds of assigned error considered either by this Court or by the Court of Appeals. As matters now stand, not only have petitioner and the individual respondents not had such review, but their right to such review is in serious jeopardy.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, or, alternatively, the basis for this Court's denial of the petition for a writ of certiorari be clarified.

Respectfully submitted,

MILTON A. BASS,
SOLOMON H. FRIEND,
Attorneys for Petitioner.

Certificate of Counsel

I, SOLOMON H. FRIEND, one of the counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision (2), of the Rules of this Court.

SOLOMON H. FRIEND,
Counsel for Petitioner.